Supreme Court of the United States

OCTOBER TERM—1944

Meseck Towing & Transportation Company,

Petitioner,

against

EDWARD E. RICE, on behalf of himself and of his co-partners, doing business under the firm name and style of JACOB RICE & SONS, as owners of the scow "GEORGE R.",

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions Below

The opinion of the District Court, officially reported in 53 Fed. Supp. 618 and the Findings of Fact and Conclusions of Law are printed in the Record (pp. 51-57).

The opinion of the Circuit Court of Appeals, officially reported in 148 Fed. (2nd) 522 appears in the Record (pp. 64-67).

II

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13th, 1925, United States Code, Title 28, Section 347. The

decree (order for mandate) sought to be reviewed was entered on May 3rd, 1945. The petition for rehearing was denied April 27, 1945.

III

Statement of the Case

A summary statement of the case is contained in the petition and is here omitted in the interest of brevity.

IV

Specifications of Errors

The Circuit Court of Appeals erred in the following respects:

1. In failing to conclude that it was the "Marion Meseck's" contractual obligation to tow vessels when directed by the Steamship Company's employee, the harbor master, and that as the "Meseck" towed the "George R." at the time and to the place directed by the harbor master any risk of damage from towing at such time and between such places was assumed by the Steamship Company.

2. In failing to conclude that libellant could not recover from the "Meseck" because he was bound by the acts of the harbor master in the employ of the Steamship Company, the consignee of the scow who assumed the risk of towage in ice.

ARGUMENT

POINT I

The Circuit Court of Appeals erred in failing to hold that libellant was bound by the act of the scow's consignee, whose employee, the harbor master, assumed the risk of damage from ice.

When an owner or a charterer orders a boat towed through ice the owner assumes the risk of damage to the tow from such ice. *Monk* v. *Cornell Steamboat Company*, 198 Fed. 472; *Clark* v. *The Bear*, 11 F. (2nd) 607; affirmed 11 F. (2nd) 608.

In this case the Circuit Court of Appeals inferred that the libellant had a cause of action against the steamship company because of the orders given by the harbor master, saying in its opinion (R. p. 66):

> "It may be that the steamship company and its employees, had they been sued by the libellant, would have been held liable; but that fact could not free the tug from liability. 'That a principal is liable for a wrong does not necessarily immunize his agent • • • The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two-stringed bow.' "

Thus it appears that the Circuit Court of Appeals recognized the steamship company as the principal in the transaction. The duties, obligations and liabilities of a tug flow from the contract between the principal and the tug or her owner and libellant must take the position that the contract or arrangement for the shifting of the "George R." was made by the steamship company for and on behalf of libellant; otherwise the "Meseck" had no obligation whatsoever to the libellant.

In that situation the Circuit Court of Appeals should have held that because the Steamship Company assumed the risk of ordering the towage at the time and under the circumstances then existing, libellant by suing the tug *in rem* cannot thereby place the risk of damage on the tug.

When libellant adopts the Steamship Company's contract with the tug, which he does by instituting suit, he must take it subject to all implied terms thereof, including the assumption of risk of damage by ice. If that be not the law, then it would follow that shifting tugs at piers may no longer carry out the orders and directions of the employee of the Steamship Company which has hired the services of the tug because the owner of the vessel to be towed is not bound by the acts of such employees. The result would be that before moving a boat the tug master would have to communicate directly with the owner of the scow or barge to be moved and secure his approval. Obviously the business of loading ocean going vessels from barges or scows would be greatly delayed by the necessity for direct communication with the owner of the vessel to be towed each time a movement from one place to another at the pier is desired.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Counsel for Petitioner.